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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 421

PATRICK J. SCULLY,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERMAN L. FALK,
Counsel for Petitioner,
342 Madison Avenue,
New York, New York.

EDWARD FRIEDMAN,
JOHN J. SULLIVAN,
EUGENE J. FINNEGAN,
Of Counsel.

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PATRICK J. SCULLY,

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Your petitioner respectfully shows:

1

Summary statement of the matter involved.

Petitioner seeks review of the judgment dated and entered on July 26, 1955 of the United States Court of Appeals for the Second Circuit, affirming a judgment dated and entered on October 25, 1954 of the United States District Court for the Southern District of New York (per United States District Judge Alexander Bicks), convicting petitioner (after a jury trial), of conspiracy to defraud the United States in violation of 18 U. S. C., Secs. 371 and 494.

The question that is principally sought to be reviewed here is the affirmance of the order of United States District Judge Goddard which denied petitioner's preliminary motion to quash the indictment because of asserted violation of

his constitutional guarantees while testifying as a witness before the Grand Jury. The Court of Appeals affirmed the order denying petitioner's motion to quash the indictment and in the course of the affirmance, two concurring opinions were rendered by two of the circuit judges. These two opinions are devoted primarily to the question raised by petitioner on the motion to quash the indictment because of his claimed violation of his constitutional rights under the Fifth Amendment.

2

Statement of the facts.

On or about December 14, 1953 petitioner was served with a subpoena to appear before the grand jury in the Southern District of New York on December 17, 1953. He complied with that mandate and appeared at the time and place specified. He had not consulted with an attorney and was not represented on his appearance before the grand jury. An Asst. U. S. Attorney was in charge of the presentment. Petitioner was interrogated before the grand jury and at no time—before, during or after—the interrogation was he advised of his constitutional rights. An indictment was found against him in whole or in part on the testimony given by him before the grand jury as to his acts constituting the offenses alleged in said indictment.

At the time of petitioner's compulsory appearance and testimony before the grand jury, questions were asked of him by the Asst. U. S. Attorney showing plainly that he was the target of the inquiry and that an indictment against him would be forthcoming. This is evidenced by the leading question of the Asst. U. S. Attorney in which he was asked: (1) what he would say if told that testimony had been given before that body that on at least twenty occasions petitioner ordered bids to be rigged; (2) that he had deposited in his bank account $4,000.

more than he had earned. These questions tie in directly with the indictment that was handed down against him and on which he was ultimately convicted.

Admittedly he was not advised or warned of his constitutional right granted to him by the Fifth Amendment of immunity against self-incrimination. After thus testifying before the grand jury, he was indicted. The indictment resulted in two trials. The first trial terminated with a jury disagreement. He was tried again and on the second trial, the jury convicted him of the charge. The judgment entered on the second trial was affirmed by the Court of Appeals and this writ is addressed to that judgment of affirmance.

The matters and questions raised at the trial itself will be bypassed without comment. The momentous question that is raised here, one of surpassing importance, is that dealing with petitioner's claim that his constitutional rights were infringed and invaded by the failure to give him warning when compelled to appear and testify before the grand jury of his right to remain mute and not to give testimony that might incriminate him.

Jurisdictional statement.

The Supreme Court has jurisdiction to review the judgment and order of the Court of Appeals pursuant to Title 28, U. S. C. Sec. 1254.

Questions presented.

The questions presented here are these:

1. Should petitioner, necessarily unattended by counsel, have been warned by the Asst. U. S. Attorney on his compulsory appearance as witness before the grand jury

of his constitutional rights under the Fifth Amendment to refuse to answer questions that might incriminate him?

2. Did the affidavit which petitioner submitted to the District Court on the preliminary motion to quash the indictment because of the failure to give him the warning requirement contain sufficient matter and substance indicating that he was to be the target of an indictment?

3. In this case and generally, should it not be mandatory for a witness, especially one who is ultimately indicted, on being subpoenaed before a grand jury and then subjected to interrogation, to receive the warning requirement of his right to immunity under the Fifth Amendment?

4. If there are prior rulings by this court indicating that this court has taken a contrary view of that subject, is this not a fitting occasion and an appropriate case for this court to refuse to be found by the rule of *stare decisis* on an overtowering question affecting an individual's liberty and to review the whole subject to the end that a wholesome approach and liberal view would dictate a reconsideration and revised attitude that such a warning requirement is mandatory and that failure to comply with it is a violation of the Fifth Amendment?

5. Should not this court take this occasion to pronounce that in all criminal cases where a person is summoned and compelled to appear and testify before a grand jury that the warning requirement is a mandatory and indispensable condition, and that failure to give this warning constitutes a violation of the Fifth Amendment?

Reasons for granting the writ.

The Fifth Amendment of the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. A

presentment before a grand jury for the purpose of determining whether a crime has been committed is a criminal case within the meaning of this constitutional provision. (*Counselman* v. *Hitchcock,* 142 U. S. 547.)

I

The constitutional amendment should receive a liberal construction.

Petitioner was subpoenaed to appear before the grand jury. He necessarily responded to that mandate. When he appeared before that body, an oath was administered to him. The prosecutor then questioned him about the material matters that are set forth in the Statement of Facts, *supra.* This interrogation concerned itself with testimony presented to the grand jury that in order to defraud the government on at least twenty occasions, petitioner had rigged bids; that he had deposited in his bank account $4,000 more than he had earned; and he was asked for an explanation. Concededly, no warning against self-incrimination was ever given to him.

Petitioner contends that the indictment that was subsequently handed down against him was vitiated by reason of this failure to afford him his constitutional rights. And that is the nub, the quintessence of this question.

In considering this point of law, the question that arises is whether this constitutional amendment shall be given a narrow and technical or a broad and liberal interpretation. In dealing with a subject so sensitive, with rights so personal and with liberties so sacred there is scant room for debate that a liberal construction is dictated. (*Boyd* v. *United States,* 116 U. S. 616, 635.)

In *United States* v. *Edgerton,* 80 Fed. 374, it was held that an indictment would be quashed when the defendant was compelled by subpoena to appear before the grand jury

as a witness, sworn and examined and required to testify to material matter without being informed or having knowledge that the grand jury had under consideration any matter involving a criminal charge against him. In that case the court said:

> "It is argued that it must be made to appear that the defendant has suffered injury in what has been done, before the objection that is made (to the validity of the indictment) can be sustained. This is true as to technical requirements and formalities, but not as to matters of substance. Where a witness is compelled to testify against himself, the injury inheres in the violation done to his rights. It is not susceptible of proof, nor the policy of the law to require it, and the injury done to the public in such cases outweighs that suffered by the defendant. It is a matter of the highest public policy that crime should be punished by legal methods."

In *People* v. *Gillette,* 126 App. Div. 665, 111 N. Y. Supp. 133, the court ruled that an indictment is rendered invalid by the defendant's self-incriminating testimony where he is required to testify before the grand jury in an investigation of a charge against him without being advised of his privilege against self-incrimination.

In *People* v. *Bermel,* 71 Misc. 356, 128 N. Y. Supp. 524, 525, the court in an opinion by Crane, J. (later Chief Judge of the New York Court of Appeals), stated (111 N. Y. Supp. 525):

> "If the witness upon such general investigation, not aimed at him, fails to claim this privilege or constitutional right, his testimony may be used against him or even be the basis of an indictment. But where, on the other hand, the investigation before the grand jury is a proceeding against him, or, being ostensibly a general investigation is, in fact, as shown by the cir-

cumstances and evidence, a proceeding against him, then the defendant's constitutional right is violated if he be subpoenaed before the grand jury, sworn and questioned, though he makes no claim of privilege or exemption. (Citing cases.) The party testifying may, in fact, be the defendant or the party proceeded against, and not a mere witness, although he be not under arrest or openly charged with the crime or proceeded against in name. The title of the proceeding cannot determine rights, as constitutional protection is one of substance and not of form. If the person examined before the grand jury be in fact the one aimed at, sought for, and charged with the crime, the title of the proceeding cannot make his examination legal."

In *People* v. *Ferola,* 215 N. Y. 285, the court stated (p. 289):

> "The practice of calling the accused as a witness in the very proceeding in which the charge is being investigated cannot be too severely condemned."

In *State* v. *Faulkner,* 17 Mo. 611, 75 S. W. 116, it is said:

> "It is intolerable that one whose conduct is being investigated for the purpose of fixing on him a criminal charge should, in view of our constitutional mandate, be summoned to testify against himself and furnish evidence upon which he may be indicted. It is a plain violation both of the law and spirit of our organic law."

In *State* v. *Froiseth,* 16 Minn. 296, it was held that the fact that defendant was required by the grand jury to appear before them and was there sworn and examined, touching on the charges contained in the indictment, vitiated the indictment. This is so although the defendant's name does not appear on the indictment as a witness.

See also:

People ex rel. Taylor v. *Forbes,* 143 N. Y. 219, 227;
State v. *Gardner,* 88 Minn. 130, 92 N. W. 529.

The general rule to be deduced from the foregoing authorities is that where an investigation takes place before the grand jury and where the facts reveal that the investigation is aimed at the witness although it ostensibly is a general investigation, then the individual's constitutional right is violated if he is subpoenaed before the grand jury, sworn and questioned though he makes no claim of privilege or exemption. In such an instance, he is in practical effect the party proceeded against and is entitled to the immunity of the Fifth Amendment or at least to the warning called for by that amendment.

II

The case of *United States* v. *Lawn,* 115 F. Supp. 674, states the correct rule.

The courts are substantially agreed that the statement of the law contained in *United States* v. *Lawn,* 115 F. Supp. 674, is a true reflection of the existing law on this subject. There it was held that where a person has already been charged with crime in an outstanding criminal information and he is then compelled to appear before the grand jury and interrogated on the very matter on which the criminal information is founded, there is unanimity of opinion that such a person must be given the warning requirement of the Fifth Amendment or the indictment against him must be voided.

In the case at bar, petitioner had not yet been indicted when he was compelled to appear before the grand jury. Yet it is easy to perceive that his indictment was foreshadowed and imminent. In a John Doe investigation, he

was summoned, sworn and asked questions which touched directly on the subject matter of his later indictment. Inquiry was made of him whether he had engaged in rigging bids, thereby defrauding the government. That is the very charge on which he was indicted and subsequently, on the second trial, convicted. Here the very heart of the charge against him was exposed to inquiry before the grand jury. Yet the prosecutor failed to advise or warn him of his constitutional right to immunity.

Therefore, Judge Frank in his concurring opinion in this case has set forth vigorous disagreement with this kind of practice. The reasons that he has advanced for the position that he has taken, it would seem, are unassailable. If the Fifth Amendment is to be infused with vigor, with strength and with protection, if it is to give a person the covering protection that it was meant to afford him, then the time when it should be invoked is when that person stands most in need of the use of that privilege. When that person appears before the grand jury, he is necessarily unattended and unprotected by counsel. He stands before that body exposed to the barbs and inquiries levelled against him. If these inquiries are perchance extraneous to the subject matter of the indictment that is subsequently rendered against him, then plainly his rights have not been invaded. However, if these inquiries trench on the very essence of the matter upon which he is subsequently indicted, then equally as plainly his rights have been infringed.

On a trial in open court, a witness is universally cautioned of his right to immunity under this amendment. That is the everyday procedure in the courts. This warning is given to the witness in open court in the presence of counsel and jury and the protection that the constitutional amendment commands is then granted to him. But in truth, when is protection most needed? When the witness or defendant is in open court, when he can have his counsel present to

protect his rights or when he appears in the sanctum of the grand jury unaccompanied by counsel, most likely uninformed of his rights, unprotected by those who would take an interest in safeguarding his rights?

III

There has been no definitive pronouncement by this court on the point raised herein by petitioner.

The cases of *Wilson* v. *United States,* 162 U. S. 613 and *Powers* v. *United States,* 223 U. S. 303, are accepted by the lower courts as guides, indeed almost as precedents, against the contention of the petitioner herein. True enough, these cases appear to mirror the views of this court, contrary to the contention here raised. As stated by Judge Learned Hand in *United States* v. *Block,* 88 Fed. (2), 618, 620:

> "Moreover, although the authorities are not wholly clear as to whether a witness must be warned of his privilege in such a case, if his testimony is to be later used against him, for us the question is determined by two decisions of the Supreme Court: Wilson v. United States, 162 U. S. 613 and Powers v. United States, 223, U. S. 303, in each of which testimony of the accused taken on preliminary examination was successfully used against him on his trial. In the first, he had been taken into custody the night before, apparently to protect him from the threats of a mob. A commissioner examined him; he was not represented by counsel or advised that he need not speak; apparently the examination was in invitum. Still, the court thought the testimony voluntary. In the second case, the accused *voluntarily* took the stand at the preliminary examination, and his statement was used against him although he had not been advised of his privilege."

It is evident that the rulings in the two cited cases are less than clear and that they are followed with implied reluctance and questioned misgivings. It puts in question whether they are all controlling precedents on a matter of fundamental constitutional rights. If the two cases cited above are representative of the contemporary views of this court, then a clarified expression of these views would seem to be in order.

IV

The rule of *stare decisis* in relation to basic constitutional rights should not be given the binding effect that is otherwise attributed to it.

In affairs affecting life and liberty, as is so powerfully urged by Judge Frank in his opinion in this case, the doctrine of stare decisis, adherence to precedent and settled law is less important than the complete fulfillment of the rights granted by the organic law. If the Fifth Amendment is to have its undiminished content of vigor and validity, the warning requirement must be given when the need is greatest. That need manifestly is greatest when he is compelled to testify at a grand jury in private, without the attendance of counsel. He stands in greatest need of this shield when compelled to attend before the grand jury and compelled to testify under oath on material matter which later forms the substance of his indictment and conviction. The Fifth Amendment is the paladium of his rights and the failure to provide him with the minimum protection vouchsafed by that amendment is an unvenial invasion of his rights.

The quest for justice should make a stronger claim on the conscience of the court than the quest for certainty in the law. And Judge Frank has not failed strongly to signify that in matters of constitutional law, the binding force of precedents is far less compelling than in the

cases of the routine affairs of the business world. As Judge Frank states in his opinion (Record, pp. 109a-110a-111a):

> "I would not feel constrained by this court's precedents on this subject. For, in respect of criminal prosecutions, involving man's liberty, stare decisis, when invoked by the government, should have far less significance than in civil suits. So the English judiciary holds. * * * Moreover, here we are considering the matter of constitutional interpretation, where, usually, precedents have even less vitality."

In *Perkins* v. *Endicott Johnson*, 128 Fed. (2), 208, 217-218, the court stated:

> "Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And where a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it."

Many assaults in devious ways have been made to undermine and weaken this constitutional safeguard. It is to the courts and principally to the highest court in the land, to which the badgered and the beleaguered must look for protection against the battering down of these protective ramparts. Today, more than ever, the need to invoke this constitutional device is ever present. Today it is given to this court forthrightly to declare that it will strike down any attempt to weaken this constitutional right no matter whence the assault emerges.

In *United States* v. *Ullman*, 221 Fed. (2) 760, 761-762, the court said:

> "It is well to add a few words about defendant's intention concerning the doctrine of Brown v. Walker, 161 U. S. 591, which held that the Fifth Amendment

privilege against self-incrimination relates solely to testimony that might lead to defendant's prosecution for a crime. Defendant asks us to modify this doctrine in the light of new circumstances which have since arisen. We are not prepared to say that this suggestion lacks all merit. But our private views on the subject have no significance. For an inferior court like ours may not modify a Supreme Court doctrine in the absence of any indication of new doctrinal trends in that court's opinions. And we perceive none that are pertinent here. Accordingly, the argument must be addressed not to our ears but to eighteen others in Washington, D. C."

V

Both opinions of the Court of Appeals and especially that of Judge Frank bespeak the attention of this court to address itself to this constitutional question.

The opinions of both circuit judges in this case strongly suggests that the question, at best moot, should be submitted for authoritative review and definitive decision. The fundamental question arises neatly in the context of this case. The learned opinion of Judge Frank practically advocates in the language of judicial etiquette an examination of this momentous question by this court—a question charged with such a high degree of merit.

VI

The distinction made between a witness and a defendant when subpoenaed to testify before the grand jury is artificial and unsound so far as the warning requirement of the Fifth Amendment is concerned.

In this case, two opinions were written by two of the circuit judges. Both opinions have concurred in affirming judgment, although on diametrically opposite grounds.

In the opinion rendered by Judge Medina, he very forthrightly states that the distinction that has been made in the district courts between a person summoned merely as a witness and a person summoned as a defendant is unsound and illogical and has no real basis in fact so far as the warning requirement of the Fifth Amendment is concerned.

VII

A sharp issue exists whether at the time of petitioner's compulsory appearance before the grand jury he was already singled out as a target for prosecution and indictment and that issue should be determined by a hearing.

In opposing petitioner's motion to quash the indictment, the prosecutor stated that petitioner was called as a witness before the ground jury in a John Doe investigation and that some time later he was indicted by that body. True enough, but the interrogation to which he was subjected points strongly to the fact that he was already the target of the inquiry and that the investigation was aimed at him. Whether or not this was the case could not be convincingly or satisfactorily decided on affidavits. The very least relief that petitioner should have been accorded was a direction that a hearing be held to decide the question.

As stated by this court in *Accardi* v. *Shaughnessey*, 347 U. S. 260, 268:

> "Of course, he may be unable to prove his allegation before the district court; but he is entitled to the opportunity to try."

CONCLUDING OBSERVATION

In the interests of justice and of authoritatively settling an important question of law pertaining to the Fifth Amendment, this writ of certiorari should be allowed.

Respectfully submitted,

HERMAN L. FALK,
Counsel for Petitioner,
342 Madison Avenue,
New York, N. Y.

EDWARD FRIEDMAN,
JOHN J. SULLIVAN,
EUGENE J. FINNEGAN,
of Counsel.

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 222

October Term, 1954

Argued April 19, 1955 Decided July 26, 1955

DOCKET NO. 23366

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

PATRICK J. SCULLY,

Defendant-Appellant.

Before FRANK, MEDINA and HINCKS, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York. Alexander Bicks, Judge.

Defendant appeals from a judgment of conviction of conspiracy to defraud the United States in violation of 18 U. S. C. Sections 371 and 494. Affirmed.

J. Edward Lumbard, United States Attorney for the Southern District of New York, New York City (Arnold Bauman, Frederic S. Nathan and John J. Donahue, Assistant United States Attorneys, New York City, of Counsel), for plaintiff-appellee.

Jesse Moss, New York City, for defendant-appellant.

MEDINA, Circuit Judge:

The evidence disclosed a well-implemented scheme, in continuous operation for many months, to defraud the government in the purchase of stationery supplies and printing for use in connection with the construction of North African air bases. Scully was purchasing agent for a joint venture of two engineering firms, Skidmore, Owings & Merrill, and Porter-Urquhart, which held a cost-plus-fixed fee contract with the government, and one Waldman, the other principal co-conspirator, was a stationery and printing supplier. The methods employed by these two, with the cooperation of several others, to circumvent the competitive bidding and other procedures designed to protect the government were many and various, including the giving of secret information enabling Waldman to put in the lowest bids, collusive bids, the use of "phony telephone bids" and numerous forgeries. There was also proof of substantial cash payments by Waldman to Scully over a considerable period of time.

Some of the rulings on matters of evidence are assigned as errors and it is claimed that the trial judge in his charge "twists the evidence" and that some of his remarks during the trial constituted "a method of evasion" to give the jury wrong impressions. The evidence points are of trivial consequence and we find no basis whatever for the charges levelled against the trial judge.

But the appeal also brings up for review an order of Judge Goddard denying appellant's motion to quash the indictment on the alleged ground that appellant had been subpoenaed to testify before the Grand Jury, that he did so testify and that although the "authorities had already marked the defendant for prosecution, intended to indict him and were engaged in bringing his indictment about," he was nevertheless not "advised of his constitutional right against self-incrimination." It would be a sufficient answer

to this contention to state that it is far from clear on this record that appellant was marked for prosecution, or that the prosecution was aimed at him or that he was, at the time he testified, in any sense accused of the crime subsequently charged against him.[1] Nor does it appear that he was unaware of his rights or that, had he been warned, he would not have testified as he did. Indeed, he testified without demur, consulted a lawyer and then voluntarily gave further testimony before the Grand Jury.

The question, however, is an interesting and important one, on which there appears to have been no definitive ruling by this court, and Judge Goddard's decision, following a line of cases decided by District Judges in this Circuit, and others, was based upon a distinction between the rights of a party, on the one hand, and those of a witness on the other. In other words, it has been held by various District Judges in this Circuit that until a formal charge is openly made against the accused, either by indictment presented or information filed in court or by complaint before a magistrate, there is no violation of constitutional right by eliciting testimony from a person called before a Grand Jury and not previously warned or advised that he has a constitutional right to refuse to answer questions, the answers to which may incriminate him. *United States* v. *Klein,* 124 F. Supp. 476 (SDNY, 1954); *United States* v. *Kimball,* 117 Fed. 156 (SDNY, 1902); cf. *United States* v. *Lawn,* 115 F. Supp. 674 (SDNY, 1953). See also *United*

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[1] In his affidavit submitted in support of the motion to quash the indictment defendant asserted that in the course of his interrogation before the Grand Jury he was asked what he would say if he were told that it had been testified before the Grand Jury that on at least twenty occasions he had ordered bids to be rigged, and that he was also asked to explain deposits in his bank account of $4,000 more than he had earned. Whether or not these questions were answered does not appear. But both at the time of his first appearance and again later, after he had consulted a lawyer, defendant asserted his complete innocence of any wrongdoing.

States v. *Miller,* 80 F. Supp. 979 (ED Pa., 1948); *United States* v. *Wilson,* 42 F. Supp. 721 (D.C. Del., 1942); *United States* v. *Benjamin, et al.,* 120 F. 2d 521 (CCA 2, 1941); *Mulloney, et al.* v. *United States,* 79 F. 2d 566 (CCA 1, 1935); *United States* v. *Wetmore,* 218 Fed. 227 (W.D. Pa., 1914).

We think this distinction may be artificial and unsound. It apparently stems from an effort to analogize the rights of witnesses and parties appearing before a Grand Jury to those of witnesses and parties at a criminal trial. The reasoning appears to be: Since upon a trial, a defendant, as distinguished from a witness, may not be called by the prosecution, and takes the stand only if he chooses to do so, similarly, before a Grand Jury, a person already indicted or against whom a criminal information or complaint has previously been filed should not be called and asked any questions, unless he evinces a willingness to be a witness and to waive his right to refuse to give self-incriminating testimony. It is concluded that there can be no effective waiver unless such a "defendant" has been informed of his rights and hence understands what he is doing, *United States* v. *Lawn, supra,* cf. *Mulloney, et al.* v. *United States, supra,* whereas, a mere witness, who may be called upon to testify at a trial without regard to his wish in the matter, may similarly be called to testify before a Grand Jury, and need not be formally warned but must assert his Fifth Amendment privilege, if he chooses to avail himself of its protection, just as he would at a trial, by asserting it as the basis for his refusal to answer specific questions.

Upon closer examination, however, it becomes apparent that the principle which underlies the rule that the defendant in a criminal trial may refrain even from being sworn as a witness, has no application to proceedings before a Grand Jury. See *United States* v. *Benjamin, supra,* at page 522.

As many of us learned for the first time when reading Dickens' Pickwick Papers, parties, including a defendant in a criminal case, were not competent to testify at common

law, although in treason cases, and perhaps others, a defendant was sometimes permitted to make an unsworn statement. To trace the general statutory pattern in the various states which marks the jettison of this ancient folly would be a mere display of learning, and of little assistance in the solution of the problem before us. Suffice it to say that the present federal statute provides that "the person charged shall, at his own request, be a competent witness," 18 U. S. C. A. § 3438; and this continues in force earlier enactments which removed a defendant's incapacity to testify in his own defense in a criminal case, but left the choice to him. (See *Brown, et al.* v. *United States,* 56 F. 2d 997 (CCA 9th, 1932). As is commonly the case, there was a reason for the particular wording of this enabling act, and this reason is to be found in the Fifth Amendment. "The purpose of the law was to make defendants competent witnesses, but at the same time preserve to them the right to remain silent without prejudice." *Wolfson* v. *United States,* 101 Fed. 430, 436 (CCA 5th, 1900), certiorari denied, 180 U. S. 637 (1901). This led to the rule that a defendant may not be called as a witness by the prosecution, for if he were sworn and thus forced in open court to refuse to answer questions on the ground that the answers might incriminate him, the "option of refusal," to which Professor Wigmore alludes[2], would be diluted. It would be difficult thereafter to take effective steps to prevent a jury, charged with the responsibility of determining the guilt or innocence of the accused, from inferring guilt from the assertion of the constitutional privilege. The result thus arrived at avoids, as it should, any encroachment upon the rights guaranteed by the Fifth Amendment. See *Wolfson* v. *United States, supra.*

These considerations do not apply to the inquisitorial proceedings of a Grand Jury. Such a body is not charged with the duty of deciding innocence or guilt and, for this

[2] Wigmore, Evidence, § 2268 (3rd Ed. 1940).

reason, its proceedings have never been conducted with the assiduous regard for the preservation of procedural safeguards which normally attends the ultimate trial of the issues. Thus, in such proceedings, there is no right to counsel, no right of confrontation, no right to cross-examine or to introduce evidence in rebuttal and ordinarily no requirement that the evidence introduced be only such as would be admissible upon a trial. (See *United States* v. *Costello,* ..... F. 2d ..... (CA 2, 1955), decided April 5, 1955.)

If, as and when the question, whether the bundle of rights in the Fifth Amendment includes that of a defendant, already charged as by indictment, to a warning when subsequently called to testify before a Grand Jury, is squarely before us, it seems not unlikely that reasons other than the distinction between parties and mere witnesses, above referred to, may convince us that, under certain circumstances or absolutely, a warning is required. We do not now say that it is not, but only that this court has not ruled on the point.

It is at least clear that a prudent prosecutor, to forestall the possibility of error, will in such cases give a warning. Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this court involving the problem under discussion would seem to indicate that some such rule or practice is observed in the prosecutors' offices in this circuit.

And so we now hold that the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury. We shall decide other cases as they arise.

Affirmed.

FRANK, Circuit Judge, concurring in the result:

For reasons I shall state later, I concur in the result. But my colleagues' opinion contains matter with which I disagree.

1. I do not agree that "the principle which underlies the rule that the defendant in a criminal trial may refrain even from being sworn as a witness, has no application to proceedings before a grand jury." Nor do I agree that the history of the privilege and that of the removal of a defendant's disability to testify in a criminal case bear out that differentiation.

Indeed, I think that the policy embodied in the privilege against self-incrimination has greater force when a man, already indicted, is called by the prosecutor to testify before a grand jury; for, unlike the defendant at the trial, the defendant before the grand jury appears without counsel to advise him of his privilege. Accordingly, I think the necessity of warning such person is even greater than after the trial commences. Therefore, I believe that *United States* v. *Lawn*, 115 F. Supp. 674 (D. C. S. D. N. Y.), states the correct rule.

2. Several state and federal courts have gone further in holding or indicating that warning is necessary if it unmistakably appears that, when a witness is under subpoena before a grand jury, the prosecutor then intended to seek the witness' indictment. See, *e. g.*, *United States* v. *Edgerton*, 80 F. 374 (D. C. Montana); *People* v. *Gillette*, 126 A. D. 665, 111 N. Y. S. 133, 136; *People* v. *Lockman*, 297 N. Y. S. 616, 618-619; *People* v. *Rauch*, 251 N. Y. S. 454, 456-457; *People* v. *Bermel*, 128 N. Y. S. 524; *State* v. *Allison*, 116 Mont. 352, 153 Pac. (2d) 141; *State* v. *Smith*, 56 So. Dak. 238, 228 N. W. 240; *State* v. *Sly*, 63 So. Dak. 162, 157 N. W. 113; *cf. Marcello* v. *United States*, 196 F.

(2d) 437, 441 (C. A. 5); *Maffie* v. *United States*, 209 F. (2d) 225, 228-229 (C. A. 1).[1]

The government argues that any such rule would be most undesirable since it would require or permit an inquiry into the prosecutor's intentions. That seems to me an inadequate argument. For ease of enforcement of criminal laws should not, I think, be a factor when the privilege against self-incrimination is involved. The Supreme Court has said that the constitutional privilege against self-incrimination and the constitutional privilege of immunity from an unreasonable search and seizure are in the nature of twins. *Boyd* v. *United States*, 116 U. S. 616, 633. It is therefore noteworthy that the Fourth Amendment authorizes a search or seizure upon a showing of reasonable cause while an intrusion on the Fifth Amendment privilege against self-crimination is invalid without regard to its reasonableness.[2] I think, however, it would be improper to permit such an inquiry if the subsequently indicted witness merely alleged, without more, that such had been the prosecutor's intention. I think it should be a condition that the indicted person state under oath, at least on information and belief, specific facts pointing very clearly to the existence of such

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[1] Were that rule applicable here, I would hold as follows:

(a) It would be improper to conjecture that the defendant, if he had been warned, might nevertheless have testified voluntarily.

(b) So, too, a conjecture that he knew his privilege; *Wood* v. *United States*, 128 F. (2d) 265, 277-278 (App. D. C.); *Johnson* v. *Zerbst*, 304 U. S. 458, 464.

(c) If he gave answers before the grand jury without a warning, the error would not be cured by the fact that, desiring to explain those answers, he later voluntarily appeared, on advice of counsel, and testified before the grand jury.

[2] See Fortas, The Fifth Amendment, 25 J. of Cleveland Bar Association (1954) 96, 99.

an intention. As I have said elsewhere concerning a closely analogous situation: "Of course, an attack on an official's decision, by recourse to off-the-record evidence, is not allowed if the allegations are vague: Legality should be more than well-ordered paper work, but allowable peering behind the paper facade has its limits. One may not compel an official to submit to courtroom interrogation in the search for possible concealed, unlawful behavior, unless one first brings forward some striking traces of it. As a consequence, well-concealed (official) misconduct may escape judicial correction. That is the price we pay to avoid having governmental action at the mercy of anyone who voices mere suspicions. For instance, to open up the judgment in the Root Refining case (169 F. (2d) 514) it would not have sufficed to allege, without more, 'The judge was bribed.' There must be an offer to prove specific facts which will pretty plainly impugn the official record. * * * Surely we would not refuse to act in a case like Root Refining on a sufficiently specific charge that a judge had been bribed to decide the case, merely because the facts, necessarily not within the first-hand knowledge of the party so charging, were stated on such information and belief. In a variety of circumstances, it has been held that such an allegation suffices where, as here, the asserted facts are thus not within affiant's personal knowledge. I think the district court should be directed to afford relator an opportunity to prove those facts, just as in the Root Refining case the Supreme Court ordered a trial of the movant's charge of bribery."[3]

But here we need not consider that problem. For defendant's affidavit, presented to Judge Goddard on the pre-

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[3] Dissenting opinion in *United States ex rel. Accardi* v. *Shaughnessy*, 206 F. (2d) 897, 901 at 904 (C. A. 2). The decision of the majority in that case was reversed in *Accardi* v. *Shaughnessy*, 347 U. S. 260.

trial motion to quash the indictment, did not allege that the prosecutor intended to indict defendant when he was called before the grand jury. The affidavit states merely: "That at the time of your deponent's compulsory appearance and testimony before the Grand Jury, it was evident from the questions of Mr. Kilsheimer, the Assistant U. S. Attorney in charge of the proceeding, that your deponent was to be named as a defendant herein. This was evident from the fact that Mr. Kilsheimer, to the best of your deponent's recollection, asked the leading question to the effect: 'Suppose we were to tell you that it has been testified before this Jury that at least on twenty occasions you ordered bids to be rigged, what would you say?' The Assistant U. S. Attorney further asked the question to the effect that your deponent had deposited in his bank account $4,000 more than he had earned, and asked your deponent to explain it." I think the quoted questions did not make it evident that Scully "was to be named" in an indictment. Consequently, Judge Goddard properly denied the motion without a hearing on evidence. On that account, I concur in the result.

3. As distinguished from a defendant under indictment, an ordinary witness, at a trial or before a grand jury, does not have the privilege of remaining completely silent but merely that of refusing to answer questions which might tend to incriminate him. Here we are deciding that there is no need to warn such a witness before a grand jury of his privilege. The Supreme Court has come very close to so holding. See *Wilson* v. *United States*, 162 U. S. 613, 623-624; *Powers* v. *United States*, 223 U. S. 303, 313-314.

It is not too difficult to justify that ruling when the prosecutor has no good reason to believe that an answer to a question will tend to incriminate him. However, when, as in the instant case, a question is such that the prosecutor cannot help knowing that the answer will incriminate

the witness, much can be said in favor of a warning-requirement. Particularly is that so when the witness is before a grand jury, for then he cannot have his counsel present to call his attention to his privilege. Accordingly, were the matter res nova, I would hold in the instant case that the failure to warn vitiates the indictment.

I would not feel constrained by this court's precedents on this subject.[4] For, in respect of criminal prosecutions, involving a man's liberty, stare decisis, when invoked by the government, should have far less significance than in civil suits. So the English judiciary holds. In *Rex* v. *Taylor* (1950), 2 K. B. 368, the Court of Criminal Appeals over-ruled its own recent decision in *Rex* v. *Turner* (1939), 1 All E. R. 330. The Court, after noting that the Court of Appeals in civil suits feels bound by its own earlier decisions as precedents in "order to preserve the rule of stare decisis," went on to say, "This court, however, has to deal with questions involving the liberty of the subject," and therefore felt free to over-rule a bad precedent which favored the prosecution. Surely that should be the attitude of our courts which are much less bound by their own precedents than English courts have been traditionally. Stare decisis, when it really bites (i. e., when a court reluctantly follows a precedent it deems unwise) finds its basic justification in the policy of not upsetting settled doctrines, no matter how unjust, on which men have importantly relied in the conduct of their affairs.[4a] Stare decisis has no bite when it means merely that a court

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[4] See *United States* v. *Block*, 88 F. (2d) 618, 620 (C. A. 2).

[4a] They rely on precedents less often than courts usually assume. See Cardozo, Growth of The Law (1924) 122: "The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision is over-ruled, is for the most part a figment of excited brains. The only rules there is ever any thought of changing are those that are invoked by injustice after the event

(*Footnote continued on following page*)

adheres to a precedent it considers correct. It becomes significant only when a court feels constrained to stick to a former ruling although the court has come to regard it as unwise or unjust. In such a case, since stare decisis then rests on a sort of estoppel, it should not lead to the perpetuation of injustice when the party who urges the court to abide by the precedent has actually not, before the suit began, changed his position in reliance on it.[5] Even, therefore, in civil cases, courts should heed Lord Wright's comment: Great judges have said that the function of the common law was the perpetual quest for justice. I should be sorry if quest for certitude were substituted for quest of justice."[6] Especially should that

(*Footnote continued from preceding page*)
to shelter and intrench itself. In the rarest instances, if ever, would conduct have been different if the rule had been known and the change foreseen. At times the change means the imposition of a bill of costs that might otherwise have been saved. That is a cheap price to pay for the uprooting of an ancient wrong."

See also Gray, The Nature and Sources of Law (1921), page 295: "Practically, in its application to actual affairs, for most of the laity, the law, except for a few crude notions of the equity involved in some of its general principles, is all ex post facto. When a man marries, or enters into a partnership, or engages in any other transaction, he has the vaguest possible idea of the law governing the situation, and with our complicated system of jurisprudence, it is impossible it should be otherwise. If he delayed to make a contract or do an act until he understood exactly all the consequences it involved, the contract would never be made or the act done. Now the law of which a man has no knowledge is the same to him as if it did not exist.

[5] See *Aero Spark Plug Co.* v. *B. G. Corp.*, 130 F. (2d) 290, 298 (C. A. 2, concurring opinion); *Commissioner* v. *Hall's Estate*, 153 F. (2d) 172, 175 (C. A. 2, dissenting opinion); Frank, Courts on Trial (1949), 268-271.

[6] Wright, The Law of "Invitation," 66 L. Q. Rev. (1950) 454, 456.

Seavey, Cogitations on Torts (1954) 68-69, says: "It is true that changes in rules are likely to lead to more litigation, since they produce a diminution of predictability, but the primary function of the law is of course justice; the likelihood of litigation alone should not prevent justice from being given."

comment guide a court in a criminal case when the government cites a precedent embodying an unjust rule adverse to the accused. For the government is not in the position of a businessman who has purchased property, or incurred a business risk, in reliance on a judicial precedent.[7] Rather is the government like one who objects to a change in a substantive rule relative as to negligence,[8] or a procedural rule of evidence or practice; as to such rules, stare decisis has relatively little vigor. Moreover, here we are considering the matter of constitutional interpretation where, usually, precedents have even less vitality.

But here, as I have said, we confront virtual rulings by the Supreme Court that a witness—if not at the time the target of a prospective criminal action—need not be warned. I think that, absent Supreme Court decisions indicating clearly a new doctrinal trend,[9] we must leave to that Court a departure from that rule.

However, it is not amiss, I think, to suggest that, aside from constitutional doctrine, the Supreme Court may deem it well, as part of wise and just administration of the federal courts,[10] to hold that a federal prosecutor must warn a witness when a question plainly calls for an incriminating answer, especially if the interrogation occurs before a grand jury.

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[7] See quotation from Cardozo, footnote 4a *supra*.
See also Seavey, Cogitations on Torts (1954) 67, 68-69, to the effect that, often, no "injustice" results but only the "loss of the expenses" of a trial.

[8] See Seavey, Cogitations on Torts (1954) 67ff.

[9] See *Perkins* v. *Endicott Johnson Corp.*, 128 F. (2d) 208, 217-218 (C. A. 2); *Picard* v. *United Aircraft Corp.*, 128 F. (2d) 632, 636 (C. A. 2); *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251, 252-253; *United States* v. *Ullman*, 221 F. (2d) 760, 762 (C. A. 2).

[10] Cf. *McNabb* v. *United States*, 318 U. S. 332; *United States* v. *Mitchell*, 322 U. S. 65; *Wood* v. *United States*, 128 F. (2d) 265, 279 (App. D. C.).

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of July, one thousand nine hundred and fifty-five.

Present: HON. JEROME N. FRANK,
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS, Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PATRICK J. SCULLY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO,
Clerk.

OCTOBER TERM, 1955

RECEIVED
OCT 24 1955
OFFICE OF THE CLERK
SUPREME COURT, U. S.

No. 421

PATRICK J. SCULLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUGGESTING THAT THE PETITION FOR A WRIT OF CERTIORARI WAS NOT FILED IN TIME

A petition for a writ of certiorari in the above-entitled case was filed on September 26, 1955. The judgment of the Court of Appeals was entered on July 26, 1955. The record of this Court shows that Mr. Justice Clark, on August 22, 1955, extended the time for the filing of a petition for a writ of certiorari to and including September 26, 1955. This was apparently done in reliance on petitioner's error in stating, in the application for extension, that the judgment of the Court of Appeals was entered on July 28, 1955, whereas the certified record from the Court of Appeals shows that judgment was entered July 26, 1955. The maximum extension of thirty days permitted under Rule 22, Revised Rules of the Supreme Court of the United States, thus expired on September 24, 1955. It appears, therefore, that petitioner's application for a writ of certiorari is out of time and should be denied.

SIMON E. SOBELOFF,
Solicitor General.

OCTOBER, 1955.

SUPREME COURT OF THE UNITED STATES

FILED
OCT 28 1955
HAROLD B. WILLEY, Clerk

PATRICK J. SCULLY,

Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent

Docket No. 481

October Term, 1955.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

EDWARD FRIEDMAN, being duly sworn, deposes and says:

1. I am one of the attorneys for the petitioner in the above captioned application for the issuance of a writ of certiorari. I am making this affidavit because the preparation of the application for the writ and all the details connected therewith were confided practically entirely to me.

IN RESPONSE TO THE MEMORANDUM OF THE SOLICITOR GENERAL THAT THE WRIT WAS BELATEDLY FILED

2. The Court of Appeals of the Second Circuit rendered its judgment for affirmance in this case on July 26, 1955. It was some time thereafter that the present attorneys, Messrs. Finnegan, Sullivan and I, were retained to prosecute the writ of certiorari. The case was committed to me for processing. This was during the intense heat of the summer, during the vacation period when it was difficult to delve into the vitals of a case of this kind, where prior to that time there had been complete lack of familiarity in regard to its antecedents.

3. Confronted with this situation, I realized it was essential for me to obtain an extension of time within which to file the writ. I therefore applied for such an extension of time but in the application, through sheer inadvertence, I stated that the judgment was rendered by the Court of Appeals on the 28th

day of July, 1955, whereas in point of fact the judgment was rendered by that court on the 26th day of July, 1955. I requested an extension of thirty days within which to file the writ. An order was made by Mr. Justice Clark of this court extending the time to file the writ to the 26th day of September, 1955. That order necessarily was predicated upon the statement that I had mistakenly made that the judgment had been handed down by the Court of Appeals on the 28th day of July, 1955, rather than on the 26th day of July, 1955, the date on which it was actually rendered.

4. When the order was made by Mr. Justice Clark of this court extending the time to file the writ to the 26th day of September, 1955, I and my associates and others who collaborated with me without further ado or question accepted the final date for filing the writ as the 26th day of September, 1955, pursuant to the order made by this court on my application. It now develops that the Solicitor General on checking the dates has discovered this inadvertent lapse of two days and has submitted this matter to the court for disposition.

5. This case is one that in my genuine opinion is charged with the highest merit. It involves an application to review a point of law arising from a construction of the Fifth Amendment. The question is one of gravest import and one that received close attention at the hands of the Court of Appeals in this case. Two of the learned judges of that panel wrote opinions in elucidation of their views on this very sensitive point of law.

6. The lapse that occurred here is quite unfortunate but the circumstances under which it occurred are in my opinion sufficiently extenuating to warrant this court in retaining the case here and passing its judgment on the writ. The papers are filed; they were received in court on the 26th day of September, 1955 in consonance with the order of this court. I apprehend that

if conditions were necessitous, I could have applied to this court within the compass of the thirty day period of extension to which the time for filing the writ was extended -- absent any lapse or mistaken information to the court on which the original order was founded -- for a further extension of time. Since the writ was filed in court on the 26th day of September, 1955, I submit that if this court deem that there has been a technical lapse with respect to the timely filing of the writ, that this is venial and curable in effect by granting an additional extension of time of two days nunc pro tunc, as though this application for an extension were made prior to the 24th day of September, 1955 which, according to the Solicitor General, would be the final date for the filing of the writ.

7. As a matter of fact, the writ was forwarded to the court on the 23rd day of September, 1955, and in normal course it could be anticipated that it would reach the court on the following day. The following day, the 24th day of September, 1955 fell on a Saturday and that may account for the fact that the papers were not delivered and received at the court until the following Monday, the 26th day of September, 1955.

8. In fine, I respectfully suggest that the circumstances of this case are such that there has been formal compliance with the direction of this court, the order specifying that the 26th day of September, 1955 was the final date for the filing of the writ and that the writ was filed on that day. There has been nothing connected with this case indicating any lapse except that the order itself was based upon a statement of dates that I made which proved incorrect. However, on its face, the order is there, the papers are filed in compliance with the order, the explanation that I am vouchsafing here is unassailably veracious and this court can deem if that be necessary that the explanation that I am providing shall be considered as an application nunc pro tunc

for an extension of time of two days which will bridge the gap or hiatus that might otherwise appear to exist in the chain of dates. Obviously, the tardiness of two days could not adversely affect or prejudice the rights of the government. On the other hand, it is equally obvious that important personal rights of the petitioner and not less equally important personal rights of myself as an attorney of long standing are involved and would be seriously prejudiced by excluding the writ from consideration by this court on such grounds. The onus and responsibility for such an untoward consequence would be too severe. This court can undoubtedly provide a procedural vehicle to assuage and override the asperity of an exclusion, a sequel too severe to be visited on all (your affiant included), and it is in that light and with that appeal that I submit this matter for its equitable consideration.

Edward Friedman

SWORN to before me this
27th day of October, 1955.

Harry Dubin

HARRY DUBIN
NOTARY PUBLIC, State of New York
No. 24-6107900
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1956